

United States District Court

Eastern District of California

Jesse Simkins,

Plaintiff,

No. Civ. S 04-1433 DFL PAN P

vs.

Findings and Recommendations

Foothill Orthopedic Medical
Clinic, et al.,

Defendants.

-oOo-

Plaintiff filed this civil rights action as a state prisoner without counsel before he was released from custody.

In his July 21, 2004, complaint plaintiff challenges the sufficiency of medical care for plaintiff's injured hand provided at Jamestown State Prison, Foothill Orthopedic Medical Clinic and Tuolumne General Hospital. He also claims defendant Tennison violated plaintiff's constitutional rights by rejecting his administrative grievances as untimely.

1 Defendant Tuolumne County (sued as Tuolumne General
2 Hospital) (hereafter Tuolumne) moved July 13, 2005, to dismiss
3 the complaint, arguing that plaintiff fails to state a claim
4 against it under the Eighth Amendment and fails sufficiently to
5 allege its participation in providing negligent medical care that
6 caused plaintiff harm. Plaintiff did not oppose.

7 August 19, 2005, defendant Tennison moved to dismiss on the
8 ground that prisoners have no constitutional right to pursue a
9 grievance. Plaintiff did not oppose.

10 In addressing a motion to dismiss under Fed. R. Civ. P.
11 12(b)(6), the court must accept plaintiff's allegations as true,
12 read the complaint most favorably to plaintiff, give plaintiff
13 the benefit of every reasonable inference that appears from the
14 pleading and argument of the case and dismiss the complaint only
15 if it is clear that no relief could be granted under any set of
16 facts that could be proved consistent with the allegations.

17 Wheeldin v. Wheeler, 373 U.S. 647, 658 (1963); Retail Clerks
18 International Association, Local 1625, AFL-CIO v. Schermerhorn,
19 373 U.S. 746, 754 n.6 (1963); Hishon v. King & Spalding, 467 U.S.
20 69, 73 (1984).

21 Defendants' arguments on their face are meritorious and the
22 court treats plaintiff's failure to oppose them as a concession
23 the orders sought should be made.

24 Accordingly, the court hereby recommends that:

25 1. Tuolumne's July 13, 2005, motion to dismiss be granted
26 and claims against it be dismissed for failure to state a claim.

2. Tennison's August 19, 2005, motion to dismiss be granted and claims against her be dismissed for failure to state a claim.

Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these findings and recommendations are submitted to the United States District Judge assigned to this case. Written objections may be filed within 20 days of service of these findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge may accept, reject, or modify these findings and recommendations in whole or in part.

Dated: January 24, 2006.

/s/ Peter A. Nowinski
PETER A. NOWINSKI
Magistrate Judge